

## MEMORANDUM OF LAW

DATE: June 8, 1995

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Last Chance Agreement Due Process Waivers

### Question Presented

May the City of San Diego ("City") require an employee to waive his or her due process right to an evidentiary hearing before the Civil Service Commission ("Commission") as a condition of continued employment after receiving an advance notice of termination following a positive drug or alcohol test?

### Short Answer

Yes. An employee may waive a due process right as long as the waiver is knowing and intelligent. However, because the Commission is granted supervision over the selection, promotion and removal of all employees of the City, through the San Diego City Charter ("Charter"), over hearings, the proposal should be approved by the Commission prior to implementation.

### Background

Recently, the City has revised and updated its substance abuse last chance agreement policy. One of the determinations made by the task force assigned to draft the revision was that all employees who tested positive for illegal substances would be given an advance notice of termination. Under the proposal, if the employee has a demonstrated history of good past performance, he or she may be offered a last chance agreement subject to certain conditions. Employees who opt for a last chance agreement, in lieu of termination, would be required to waive their due process right to an appeal before the Commission should the last chance agreement be violated and termination ultimately imposed. The appeal waiver is to be limited strictly to appeals based upon violations of the last chance agreement and would not be extended to disciplinary actions that arise outside the parameters of the last chance agreement. You have asked if it is legally permissible to require an employee to waive a due process right as a condition of employment.

### Analysis

A permanent or tenured civil servant has a vested property interest

in continued employment. This property interest is entitled to certain due process protection. *Coleman v. Department of Personnel Administration*, 52 Cal. 3d 1102, 1109 (1991). Due process requires that prior to termination, an employee must have notice of the proposed action and the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 215 (1975). Due process also gives an employee the right to appeal his or her termination. Charter section 115 vests the Commission with authority over the selection, promotion and removal of employees subject to the Civil Service provisions and, therefore, authority over the hearings required by due process. The decision of the Commission after the hearing is administratively final. Charter Section 129.

It is well established that an individual may waive his or her constitutional rights. Even the most fundamental rights can be waived. *Blair v. Pitchess*, 5 Cal. 3d 258, 274 (1991)(Fourth Amendment right to be free from unreasonable searches and seizures); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (First Amendment freedom of speech); *City of Glendale v. George*, 208 Cal. App. 3d 1394, 1398 (1989)(First Amendment freedom of expression and association).

Due process rights may also be waived. *Isbell v. County of Sonoma*, 21 Cal. 3d 61, 64 (1978). This may include the waiver of the right to a hearing. *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *County of Los Angeles v. Soto*, 35 Cal. 3d 483, 489 (1984)(waiver of paternity hearing).

However, the legitimacy of a waiver is problematic when the waiver concerns the right to a future hearing on allegations which have not yet been made, and may never be made. The City's last chance agreement creates this situation by requiring a waiver of hearings on both current and future allegations of drug use. We find no authority specifically addressing the legality of last chance agreements. Therefore, the ability to waive the right to future hearings must be analyzed through analogy.

The following are two examples of waivers of future rights found by the courts to be acceptable. First, as a condition of probation, a probationer may be required to waive his or her right to contest the lawfulness of future searches and seizures. *People v. Mason*, 5 Cal. 3d 759, 764-765 (1971); *People v. Bravo*, 43 Cal. 3d 600, 608-609 (1987). Once such a waiver is made, the probationer has no reasonable expectation of the Fourth Amendment protections against unreasonable searches or seizures.

The due process waiver in a last chance agreement is similar to a Fourth Amendment waiver in that both are made without knowledge of what future events may bring. However, courts have concluded that the lack

of certainty about future events does not invalidate a Fourth Amendment waiver. Similarly, a lack of certainty should not invalidate a due process appeal waiver.

The proposed due process waiver is also similar to a loan agreement known as a cognovit note. Under a cognovit note, the debtor consents, in advance, to the holder obtaining a judgment without notice or a hearing. This agreement effectively waives the debtor's due process rights to a hearing. While a cognovit note is sometimes discouraged as being too harsh on the debtor, it does not, per se, violate due process. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972); *Commercial Nat. Bank of Peoria v. Kermeen*, 225 Cal. App. 3d 396 (1990).

For example, in *Overmyer*, the plaintiff argued that a "contract waiver, before suit has been filed, before any dispute has arisen and whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have . . . is unconstitutional." *Overmyer* at 184.

The Court disagreed, noting "*Overmyer* may not have been able to predict with accuracy just how or when Frick would proceed under the confession clause if further default by *Overmyer* occurred, as it did, but this inability does not in itself militate against effective waiver." *Id.* at 187.

Thus, uncertainty about future events did not prevent *Overmyer* from waiving its due process rights. Similarly, a City employee can waive his or her due process right to a hearing on future allegations provided the requirements for a valid waiver are met.

#### Requirements for a valid waiver

A waiver of due process rights must be voluntary, knowing and intelligent. *Isbell v. County of Sonoma*, 21 Cal. 3d at 69-70. The importance of due process rights requires that the waiver of such rights not be presumed. In fact "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.* at 69. Additionally, due process rights are personal to the individual and may not be waived through a collective bargaining agreement. *McMillen v. Civil Service Com.*, 6 Cal. App. 4th 125, 132 (1992).

##### I. Voluntariness

Courts view the issue of voluntariness with caution. They are wary of disparities in bargaining power between parties. In particular, waivers contained in adhesion contracts are often found to be involuntary because one party to the agreement receives nothing for his or her waiver. *Isbell*, 21 Cal. 3d at 69.

The situations examined by *Isbell*, however, can be distinguished from the waiver contemplated by the last chance agreement. *Isbell* addresses consumer contracts, where the due process waiver is collateral to an exchange of money for goods or a promise to repay. The due

process waiver is not collateral to a last chance agreement; it is the subject matter of the contract. That is, the consideration received by the City for its participation in the contract is the employee's agreement to waive future due process hearings which might arise if the employee violates his or her part of the agreement. The employee cannot claim that he or she receives nothing for the waiver. Rather, the employee receives the benefit of continued employment which would otherwise be lost because of the employee's misconduct. Moreover, the employee may refuse to enter into the agreement and appeal the discipline imposed for the current conduct to the Commission.

## II. Knowing and intelligent

The mere fact that a party reads and executes an agreement does not mean the waiver contained in the agreement has been made in a knowing and intelligent manner. *County of Ventura v. Castro*, 93 Cal. App. 3d 462, 471 (1979). Individuals who sign waiver documents often do not realize they are waiving not only their right to notice and a hearing, but also the opportunity to present any defense to the allegations. *Isbell*, 21 Cal. 3d at 70. For a waiver to be knowing and intelligent, there must be an express statement setting forth the party's rights and indicating those rights are knowingly waived without coercion. *Castro*, 93 Cal.App. 3d at 471.

To some, the nature of the waiver is immediately apparent. However, many employees, unfamiliar with the terms "due process" and "evidentiary appeal," may not understand that they are giving up the opportunity to present a defense before the Commission. Without that understanding, a waiver cannot be voluntary and intelligent.

To assure a waiver is knowing and intelligent, a last chance agreement should clearly set forth each of the rights the employee is relinquishing in exchange for continued employment. The agreement should indicate the employee has a right to challenge disciplinary action taken by the City before the Commission for both the current and any future violations of the anti-drug policy. The agreement should indicate the employee is giving up this right in return for continued employment. It would be helpful if the employee's rights and the waiver are somehow highlighted on the page (e.g., numbering, indenting, or bold type) in simple, non-legal language. Such clear documentation will make it unreasonable for an employee to later assert he or she "didn't know" or "didn't understand" the full impact of the agreement. When such precautions are taken and the employee has been fully informed of all the consequences of entering into the agreement, the waiver will be knowing and intelligent.

## Conclusion

The City's last chance agreement is constitutional and not invalid per se. Although permanent City employees are guaranteed certain due process rights, those rights can be waived by the employee. This is so

even if the employee waives his or her right to future hearings before the Commission on violations that have not occurred, and may never occur.

The last chance agreement is enforceable if the employee's waiver is voluntary, knowing and intelligent. Absent coercion, voluntariness should not be an issue. However, a waiver might not be knowing and intelligent if the employee did not understand the full consequences of his or her actions. Such understanding can be assured by detailed recitation of the rights being vested. Such precautions will legally validate the last chance agreement.

Finally, the general proposal to include hearing waivers as a term of a last chance agreement should be approved by the Commission. It is not necessary that the Commission approve each agreement. However, final authority to determine whether a waiver is voluntary, knowing and intelligent should remain with the Commission.

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